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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 298

STOCKHOLDERS OF PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, APPELLANTS,

vs.

WARREN F. STERLING, RECEIVER FOR PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND, ETC., APPELLEE.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

The Opinion of The Circuit Court For Washington County, Maryland, is set forth in the Record, Page 27, and is not reported elsewhere.

The Opinion of the Court of Appeals of Maryland is reported in 169 Md. 678 under the title of "Ghingher vs. Bachtell". Mr. Sterling has since succeeded Mr. Ghingher as State Bank Commissioner and Receiver. Mr. Tiffany, State Reporter, has certified that the words "minimum" and "maximum" in the first sentence of the first paragraph in 169 Md., page 690, differ from their position in the original opinion and were by mistake transposed for the printing. Chief Judge Bond has certified that the sentence as printed in 182 Atl., page 563, is correct. The Opinion is correctly printed in the Record, page 43.

STATEMENT OF THE CASE

The Peoples Banking Company of Smithsburg, Maryland, was incorporated under the General Laws of the State of Maryland on January 24, 1910, and operated as a going banking business from shortly after said date until some date in 1931, not later than the month of September, 1931, when it ceased doing business. Article 2 of the Certificate of Incorporation (R. 22) states that the corporation is formed "to transact such business as is set out by the terms and conditions in these Articles of Incorporation and in the by-laws of said corporation which may be hereafter adopted, subject to all the conditions in the Public General Laws of Maryland, applicable to a corporation of this charter OR THE AMENDMENTS THERETO WHICH MAY HEREINAFTER BE ENACTED" (Capitals ours). On January 10, 1922, the Certificate was amended whereby the capital stock was increased from $20,000.00 to $40,000.00 (R. 25), divided into 4,000 shares of the par value of $10.00 each. John J. Ghingher, Bank Commissioner, was appointed Receiver of said Bank on or about May 5, 1933, by the Circuit Court For Washington County, Maryland. Warren F. Sterling has since succeeded John J. Ghingher as Bank Commissioner and has been duly appointed Receiver of this Bank in place of the said John J. Ghingher. On Petition of the Receiver (R. 3) a final Order of Court was passed on June 19, 1933, (R.6) decreeing that each stockholder of the Bank be required to pay to the Receiver an amount of money equal to the par value of the stock in the bank held by him and further authorizing and empowering the Receiver to collect said sums and enforce payment thereof by appropriate legal proceedings. Subsequent to the passage of the assessment Order of June 19, 1933, the Receiver upon several occasions mailed notices to the record stockholders of said Bank notifying them of said assessment and calling upon them to pay the same (R. 21). Many stockholders paid to the Receiver the amount of their stock liability, as set forth in Sec. 3 of the petition of Earl R. Bachtell, et al, (R. 12). Pursuant to an Order of Court passed December 26, 1934, the Receiver filed suit against delinquent stockholders on December 28, 1934, in No. 12,817 Equity in the Circuit Court For Washington County, Maryland (R. 21). (This Equity cause has since been dismissed and a separate suit at law filed against each de-

linquent stockholder). Petition to rescind assessment Order of June 19, 1933, was filed February 15, 1935, (R. 7) and Answer thereto was filed March 6, 1935, (R. 14). After due hearing, the Circuit Court For Washington County, Maryland, on July 27, 1935, filed an Opinion (R. 27) and on July 31, 1935, filed a Decree (R. 40) revoking and rescinding the assessment Order of June 19, 1933. After due hearing on an appeal taken by the Receiver, the Court of Appeals of Maryland, on January 22, 1936, filed an Opinion (R. 43) and on February 20, 1936, filed a Decree (R. 58) reversing the Decree dated July 31, 1935, of the Circuit Court For Washington County. The original assessment Order of June 19, 1933, (R. 6) was thereby revived and restored.

SUMMARY OF ARGUMENT.

1. SECTION 39 OF ARTICLE III OF THE CONSTITUTION OF MARYLAND PROVIDES THAT

> "The General Assembly shall grant no Charter for Banking purposes . . . except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; . . . . "

2. MARYLAND ACTS OF 1870, SEC. 11 OF CHAP. 206, provided

> "And be it enacted, That the continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; AND UPON THIS FURTHER CONDITION, THAT THIS ACT AND EVERY PART OF IT MAY BE ALTERED FROM TIME TO TIME, OR REPEALED, BY THE LEGISLATURE." (Capitals ours).

3. Several later Statutes were passed applicable to trust companies, but the above act of 1870 was the only Act pertaining to banks alone until June 1, 1910, the effective date of SEC. 72 OF ARTICLE 11 OF THE MARYLAND CODE, which provides

> "Stockholders of every bank and trust company shall be

held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock,—and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the Order of a Court of competent jurisdiction....."

4. SEC. 71 M, CHAP. 46, OF THE MARYLAND ACTS OF 1933 (sometimes referred to as "Emergency Banking Act") provides

"Nothing contained in this Act shall be construed to relieve any stockholder of record in any banking institution at the time of the passage of this Act, from the liability imposed by Section 72 of this Article. Any person who may be a stockholder at the commencement of said period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the receiver for the statutory assessment on said shares...."

5. Section 39 of Article III of the Maryland Constitution is not self-executing. It does not say that the stockholders of a bank ARE liable. It simply says the General Assembly shall not grant any Charter without making them liable. It fixed a minimum liability that the Legislature had to impose by charter or general statute, but it did not fix the maximum liability that could be so imposed.

6. Section 11 of Chap. 206 of the Maryland Acts of 1870 imposed by General Statute a liability on bank stockholders to the extent of the par value of the shares. It did not state to whom the liability was, or how it was to be enforced.

Section 85L of Chap. 109 of the Maryland Acts of 1892 imposed on stockholders in trust companies (which are also banks, in that they possess banking powers) a liability for DOUBLE

the par value of their stock. This act made the liability to the depositors and creditors.

Sec. 85L of Chap. 101 of the Maryland Acts of 1904 imposed on stockholders in trust companies a liability for the par value of their stock and made the liability an asset of the corporation and enforceable by a receiver. The language of this Act is practically the same as Sec. 72 of Art. 11 of the present Maryland Code.

7. Sec. 72 of Art. 11 of the Maryland Code places no heavier liability on a bank stockholder than that of the par value of his shares, the same as the extent of the liability in Sec. 11 of Chap. 206 of the Maryland Acts of 1870. The later Act merely altered and remodeled a remedy, providing a new and adequate and efficacious remedy in substitution for that which it superseded.

Those of the Appellant stockholders who acquired their stock shortly before the present liability statute became effective on June 1, 1910, held their stock during practically the entire period the bank operated and obviously held their stock when all debts of the bank were contracted. They would be liable for the full par value of their stock under the old statute. The present statute simply makes the Receiver the one to enforce the liability instead of individual creditors who became such during the period of stock ownership.

Those who acquired their stock after the present liability statute became effective on June 1, 1910, assumed the liability under the present statute when they became stockholders.

8. The Court of Appeals of Maryland has held that the character of stockholders' liability under statutes applicable to business corporations is the same as the character of liability under the bank and trust company statutes (Colton vs. Mayer, 90 Md. 711, 715; Murphy vs. Wheatley, 102 Md. 501, 519).

The validity has been upheld of a statute changing the remedy for enforcing statutory liability against stockholders in business corporations and making the liability enforceable in one equity proceeding whereby the amount recovered should be divided among the creditors pro rata, in place of the former statute whereby each creditor could sue a stockholder who was such at

the time the debt to the creditors was contracted (Pittsburgh Steel Co. vs. Baltimore Equitable Society, 113 Md. 77).

The Supreme Court of the United States sustained the Court of Appeals of Maryland in the above case and held that the obligation of contract was not impaired.

Pittsburgh Steel Co. vs. Baltimore Equitable Society, 226 U. S. 455; 33 S. Ct. 167.

9. All of the Maryland cases previously decided construed provisions of the statute in effect at the time the cases were instituted and no cases have previously construed the effect of the Maryland Constitutional provision. The Maryland Court of Appeals in this case stated (R. 51) it to be the first time the Constitutional provision has been considered.

ARGUMENT

On June 1, 1910, Sec. 72 of Art. 11 of the Maryland Code (Summary, Par. 3) became effective and made bank stockholders liable for the par value of their stock to the Receiver, if necessary to pay the debts of the corporation. The Peoples Banking Company of Smithsburg had been incorporated earlier in that same year. Sec. 39 of Art. III of the Maryland Constitution (Summary, Par. 1) is contained in the Constitution adopted in 1867. The Constitutional provision is not self-executing. The language places a prohibition upon the General Assembly and forbids it to charter a bank except upon the condition that THE GENERAL ASSEMBLY impose the liability upon the stockholders to the extent of the par value of the shares. The provision in the Constitution does not say that the stockholders of a bank ARE liable. It simply says the General Assembly shall not grant any Charter without making them liable.

The Legislature could impose the liability mentioned in the Constitution by Special Charter or by Statute applicable to all banks. The Maryland Acts of 1870, Sec. 11 of Chap. 206 (Summary, Par. 2) provided a general statute imposing the liability on the stockholders and directors of banks, but it did not state to whom the liability was, or how it was to be enforced. As The Maryland Court of Appeals stated in this case (R. 52), there was no actual contract between stockholders and creditor. A liability was created and the Courts were forced to devise some

foundation for suits brought to enforce the liability and the "fictional" contract theory was invoked. In the dissenting opinion in COOMBES vs. GETZ, 285 U. S. 434, 52 S. CT. 435, reference is made that "The Supreme Court of California has said that the liability thus created is contractual, but only in a qualified sense, as the expression of a legal fiction, is the statement true,...."

From time to time Maryland cases were decided solely upon the statute then in effect. None of the Maryland cases construed the effect of the Constitutional provision. In some of the cases the Court recognized the right of the Legislature to change the statutory liability, as long as the minimum liability mentioned in the Constitution was maintained. It was held in MISTER vs. THOMAS, 122 MD. 445, 457, that where the charter of a corporation granted it power to do a banking business, it was not within the power of the Legislature to exempt stockholders from liability mentioned in the Constitution. All trust companies have banking powers and therefore are subject to the Constitutional provision.

While MURPHY vs. WHEATLEY, 102 MD. 501, (1906) applies to trust companies, as to which Maryland Acts of 1904, Sec. 85L of Chap. 101, made the liability to the Receiver instead of to the creditors, it upholds the point that the Legislature could impose a greater liability than mentioned in the Constitution, as was done by Maryland Acts of 1892, Sec. 85L of Chap. 109, making a double liability. This decision covers the case where the liability was to the creditors and upheld the principle applicable under such liability, whereby a plaintiff creditor had to show that he became a creditor while the defendant was a stockholder. But the Court states on pages 517 and 518 that "As the Legislature has changed the liability of stockholders of these companies by the Act of 1904, the decision may no longer be important as a precedent, but the rights of the parties to this suit are to be determined according to 'the existing laws of this state' when that Act was passed". The Act of 1904 referred to by the Court is practically the same as Sec. 72, of Art. 11 of the present Maryland Code. It made the liability an asset of the corporation for the benefit ratably of all creditors and made the liability enforceable by the Receiver. The Act it super-

seded had been worded, and applied by the Courts, similar to the bank liability Act of 1870. The Court stated that its last decision under the old Act of 1892 was no longer a precedent and recognized the changed liability and procedure which was to be applicable to trust companies, but which also had banking powers and were subject to the Constitutional provision.

In COLTON vs. MAYER, 90 MD. 711, (1900) the Court held under the Statute then in effect that the Receiver could not enforce bank stockholders' liability. But the Court might almost be said to have contemplated the time when the statute would be changed, and pointed out that a particular statute only was being construed, by saying, page 714, "Some liability similar to this is generally fixed by statute upon the owners of stock in banking and other corporations that earn their profits out of the money of others, and it is sometimes provided, as in the case of national banks for example, that in the event of failure the receiver can collect what is due on the statutory liability, but in the absence of some law giving him the right to do so, we cannot understand upon what principle he can maintain a suit on a statute such as we have before us," and on page 712, "Inasmuch as this charter does not expressly authorize the receivers to sue, the test of their right to do so is to ascertain whether it gave the corporation any property or estate in this liability of the stockholders, OR IN ANY MANNER MADE IT AN ASSET OF THE BANK...." (Capitals ours).

In MISTER vs. THOMAS, 122 MD. 445 (1914) the Court held on pages 457 and 458 that the liability of stockholders, under Sec. 72 of Art. 11 of the Maryland Code, was to be treated as an asset of the corporation and enforced by the Receivers under the Orders of the Court. This case and LANGE vs. GHINGHER, 168 MD. 353 (1935) and ROBINSON vs. HOSPELHORN, 169 MD. 117 (1935) seem to directly consider and uphold Sec. 72 of Art. 11 of the Maryland Code. The last named case on page 134 refers to MISTER vs. THOMAS SUPRA, as "construing a similar statute."

Under the interpretation given the old statute the liability of the stockholder was to the creditor. In such case there could be set-off by a stockholder of money he had in the bank against his liability. But where the liability was to the creditor there

was a mutuality that can not exist when the liability is to the receiver and is an asset of the corporation. The Court in CAHILL vs. ORIGINAL BIG GUN, ETC. ASSN., 94 MD. 353, repeated that it had been held in Colton vs. Mayer, supra, that the stockholders' liability was directly to the creditors and not to the Receiver for the benefit of creditors, under the statute then existing. The Court then goes on to say that under such condition there can be set-off by a stockholder of money he has in the bank against his liability, but quotes with approval on page 355 from Cooke on Corporations Vol. 1, Sec. 225 (c) to the effect that "Where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholder cannot set off an indebtedness of the corporation to him." The fact that a stockholder cannot claim set-off under the present statute is held by Judge Urner in his Opinion in No. 12,703 Equity of the Circuit Court For Frederick County, Maryland, as to stockholders of the Central Trust Co., as reported in The Daily Record, Baltimore, Md., of February 6, 1934, citing STANDARD PRINTING AND PUBLISHING CO. vs. BOTHWELL, 143 MD. 303, and 40 A. L. R. 1183. This Opinion in the Central Trust Co. case further held that no matter how close to the time of receivership a stockholder had purchased his stock, and no matter what fraudulent representations as to solvency were made in selling the stock,—claiming and exercising the rights of a shareholder and accepting dividends estopped him from denying his stockholders' liability because the rights of third parties intervened at the time of the receivership and it was no longer a matter between the stockholders and the bank.

It is apparent from the Maryland cases that the Court in each case was construing only the statute involved. The Court said in COLTON vs. MAYER, 90 MD. 711, 716, 717, "It was said, in passing on the liability under the statute we have referred to above, in Norris vs. Wrenschall, 34 Md. 492, 'It is a debt under the statute due from the stockholder to the creditor, springing out of and co-existent with the contract between the corporation and the creditor.' And all the cases that have been decided in this State affecting the STATUTORY (Capitals ours) liability of stockholders have been to the same effect". The language of the Court in many of the cases shows that the Court contemplated

that the statute could be changed. Sec. 72 of Art. 11 of he Maryland Code is substantially in the language of the National Banking Act, Sec. 5151 of the Revised Statutes of the United States. The stockholders' liability is made an asset of the corporation and enforceable by a receiver, instead of the liability being to each creditor as he became a creditor, as had been held under the previous statute. When the liability is, as now, to the Receiver there is no question of any creditor being such at the particular time any stockholder owned stock. This seems rather to be the intent of the Constitution when it says that the stockholders shall be made liable for ALL the debts and liabilities of a bank, and the present statute seems to better carry out this intent than the former statute, under which the Courts held the stockholder as not liable for ALL the debts of the bank, but only for the debts contracted while he was a stockholder. The Constitution does not say the liability shall be made to the creditors. The Courts construed the former statute as making the liability to the creditors. Either a liability to the creditors or to the Receiver complies with the Constitution as long as the liability to the extent of the par value of the stock is placed on the stockholders. The Act of 1870 specifically reserved the right to alter or repeal by concluding with the words "and upon this further condition, that this Act and every part of it may be altered from time to time, or repealed, by the Legislature" (Summary, Par. 2). The charter of this bank imposed on those who might become stockholders the obligation that a change in the law might effect by stating in Art. 2 of the Certificate of Incorporation (R. 22) that the corporation is formed "to transact such business as is set out by the terms and conditions in these Articles of Incorporation and in the by-laws of said corporation which may be hereafter adopted, subject to all the conditions in the Public General Laws of Maryland, applicable to a corporation of this charter OR THE AMENDMENTS THERETO WHICH MAY HEREINAFTER BE ENACTED (Capitals ours)."

Sec. 72 of Art. 11 of the Maryland Code placed no heavier liability on a bank stockholder than that of the par value of his shares, the same as the extent of the liability that had been imposed by Sec. 11 of Chap. 206 of the Maryland Acts of 1870. The later Act merely altered and remodeled a remedy, providing

a new and adequate and efficacious remedy in substitution for that which it superseded, which was not a retroactive operation which could be objectionable.

Thistle vs. Frostburg Coal Co., 10 Md. 144
Baugher vs. Nelson, 9 Gill (Md.) 303.
Pittsburgh Steel Co. vs. Balto. Equitable Society, 113 Md. 77
Bernheimer vs. Converse, 206 U. S. 516; 27 S. Ct. 755
Henley vs. Myers, 215 U. S. 373; 30 S. Ct. 148
Pittsburgh Steel Co. vs. Balto. Equitable Society, 226 U. S. 455; 33 S. Ct. 167.

It is apparent that this is entirely different from the situation in HAWTHORNE vs. CALEF, 69 U. S. 10; 2 WALL. 10; LOUISANA vs. PILSBURY, 105 U. S. 278; and COOMBES vs. GETZ, 285 U. S. 434; 52 S. CT. 435. In each of these cases a liability was entirely wiped out and no other remedy provided.

It has been uniformly upheld that a State Legislature may change a statute and provide a new remedy without impairing any obligation of contract, when a new and adequate and efficacious remedy is substituted for that which is superseded. It is so stated in LOUISANA vs. PILSBURY, 105 U. S. 278 at page 301.

In HENLEY vs. MYERS, 215 U. S. 373; 30 S. CT. 148, a Kansas Statute of 1868 and 1889 made stockholders of certain corporations liable for corporation debts to the extent of any unpaid subscription and the par amount of the stock in addition. Enforcement was by individual suits and transfer of stock had to be noted on the books of the corporation to relieve the stockholder of the liability. Act of 1898 made the liability to the creditors and to be considered an asset of the corporation in event of insolvency and to be collected by the Receiver for benefit of all creditors; it further required a transfer of stock to be recorded with the Secretary of State, in addition to being noted on the books of the corporation, to relieve the stockholder of the liability. A stockholder acquired stock in 1887 and sold it in 1899. The transfer was not recorded with the Secretary of State. In a suit by the Receiver the stockholder contended that the requirement of recording the transfer with the Secretary of State, and the statute under which the suit was brought by the Receiver,

impaired the obligation of contract, because that was not the law when he acquired his stock. It was held that there was no impairment of contract and that before the Act of 1898 the stockholder was obliged to see that the transfer of stock was noted on the corporation books and after the Act of 1898 there was the additional duty on the stockholder to see that the transfer was noted on a public record. This Court further said in 30 S. Ct. at page 152, "Equally without merit is the contention that the Statute of 1899 impaired the obligation of the stockholders' contract, in that it substituted for individual actions against them a suit in equity by a receiver appointed after judgment against the corporation. In becoming stockholders, the defendants did not acquire a vested right in any particular mode of procedure adopted for the purpose of enforcing their liability as stockholders. It is a well established doctrine that mere methods of procedure in actions on contract, that do not affect the substantial rights of parties, are always within the control of the State. It is to be assumed that parties make their contracts with reference to the existence of such power in the State."

In BERNHEIMER vs. CONVERSE, 206 U. S. 516; 27 S. CT. 755, the Minnesota Constitution provided, "Each stockholder in any corporation (except those organized for the purpose of carrying on any kind of Manufacturing or Mechanical business) shall be liable to the amount of stock held or owned by him." An Act of 1894 made the creditors the ones to enforce the liability. An Act of 1899 made the liability enforceable by the receiver. It is to be noted that the Minnesota Constitutional provision was self-executing. The stockholder is made liable by the direct language "shall be liable" and the liability was fixed at "amount of stock," no more and no less. The Maryland Constitutional provision is not self-executing; it fixes the minimum liability that must be imposed by the General Assembly, but does not fix the maximum liability that may be imposed. The Minnesota Constitutional provision was much more inflexible, but this Court held that the change in enforcment did not impair the obligation of contract. This Court said in 27 S. Ct., at page 759, "It may be settled that, upon acquiring stock the stockholders incurred an obligation arising from the Constitutional provision, contractual in its nature, and, as such, capable of be-

ing enforced in the Courts not only of that state, but of another state and of the United States (citations), although the obligation is not entirely contractual, and springs primarily from the law creating the obligation". And on page 760, "The liability arising under the Constitution of Minnesota was such that legislation was appropriate to make it effectual. We can find nothing in the fact that one legislature has passed an act which would conclude a subsequent lawmaking body of equal power from passing new and additional measures to make the remedy more effectual. That the first act did not accomplish its purpose is evident. . . . In this condition of affairs the State of Minnesota has undertaken to provide a proceeding for the settlement of insolvent corporations which shall ascertain the assets of the corporation, the amount to which it is necessary, if at all, to call upon the stockholders' liability. It is obviously an act intended to make effectual the liability which is incurred by stockholders under the Constitution of the State, and it ought not to be rendered nugatory unless substantial objection exists against its enforcement."

In PITTSBURGH STEEL CO. vs BALTIMORE EQUITABLE SOCIETY, 226 U. S. 455; 33 S. Ct. 167, this Court practically decided the points raised in the appeal in the present case. In that case a creditor brought suit against a stockholder for his stock subscription which had not been fully paid. The action was begun on February 26, 1908, and at that date it could be maintained. But in April a statute was enacted, Maryland Acts of 1908, Chap. 305, making the stockholder's liability assets of the corporation, saving the rights of creditors at the date of the Act, but providing that the exclusive remedy for such rights, as against Maryland stockholders, should be by bill in equity, on behalf of such creditors as might come in. The Act abated pending actions. The pending action of the creditor was abated and the Maryland Court of Appeals sustained the Constitutionality of the Act in Pittsburgh Steel Co. vs. Baltimore Equitable Society, 113 Md. 77. On appeal to this Court the Maryland Court of Appeals was sustained. This case involved a statute covering liability of stockholders in business corporations, but it is the settled law in Maryland that the character of the liability is the same as the liability under the statutes applicable to banks, as

held in Colton vs. Mayer, 90 Md. 711, 715, and Murphy vs. Wheatley, 102 Md. 501, 519. In the latter case, at page 519, the Court repeats what it said in Colton vs. Mayer, supra, as to statutes covering stockholders' liability in business corporations and in banks, by saying, "but the character of the liability was the same, and the main difference being that under it the stockholders were relieved from their obligations to creditors when all of the capital stock was paid."

Some of the appellant stockholders acquired their stock shortly before Sec. 72 of Art. 11 of the Maryland Code became effective on June 1, 1910. They claim that their liability under the statute in effect when they acquired their stock was to the creditors who became such during their period of stock ownership. The bank was incorporated on January 24, 1910, so these stockholders could not have acquired their stock more than a few months before the effective date of the present statute, which was more than 21 years before the bank ceased doing business. They held their stock during substantially the entire period that the bank operated and obviously held their stock when substantially all debts of the bank were contracted. The deficiency of the bank of "at least $40,000" (R. 21) is far in excess of the entire original capitalization of $20,000 contained in the original charter (R. 23). So that any stockholders who acquired their stock before June 1, 1910, would be liable for an amount of debts vastly in excess of those few shares of stock. There is therefore no possible contention that, if their liability were to be ascertained under the old statute, it could possibly be found that their liability would be less than the full par value of their stock. The present statute simply makes the Receiver the one to enforce the liability instead of individual creditors who became such during the period of stock ownership. It is further true that the original stockholders acquired their stock under a charter making them subject "TO ALL THE CONDITIONS, PROVISIONS, RELATIONS AND POWERS CONTAINED IN THE PUBLIC GENERAL LAWS OF MARYLAND, APPLICABLE TO A CORPORATION OF THIS CHARTER OR THE AMENDMENTS THERETO WHICH MAY HEREINAFTER BE ENACTED" (R. 22). And Maryland Acts of 1870, Sec. 11 of Chap. 206, in effect before June 1, 1910, specifically concluded,

"AND UPON THIS FURTHER CONDITION, THAT THIS ACT AND EVERY PART OF IT MAY BE ALTERED FROM TIME TO TIME, OR REPEALED, BY THE LEGISLATURE."

The present statute imposed no new contract upon existing stockholders, as any liability under this satute was not incurred until insolvency of the bank and appointment of a receiver. The statute applies uniformly to all stockholders of all banks and is certainly not discriminatory, as alleged in the petition of these stockholders (R. 9). After June 1, 1910, any stockholder could have disposed of his stock and would have been subject to no liability whatever by any of the provisions of the present statute. When any of the original stockholders continued to hold their stock and accept dividends thereon, including the last dividend thereon about January 1, 1931, (R. 21), they acquiesced in the provisions of the present statute.

The former practice, prior to the present statute, whereby a stockholder was held to be liable to creditors who became such while he was a stockholder, fastened a liability on a stockholder who had disposed of his stock in good faith long before the insolvency of the corporation. It is submitted that this is entirely inconsistent with the modern attitude towards corporation law. The former practice originated almost a century ago when the modern attitude toward the corporate entity had barely begun to develop. In the modern view, when an individual sells stock owned by him he transfers all rights, benefits and liabilities incident to that stock. He may sell the stock while the corporation is entirely solvent. He may sell his stock because he does not have confidence in new management that has obtained control of the corporation; and later bad management may render insolvent what was formerly a prosperous corporation. Certainly a former stockholder should not be liable for conditions brought about after he has disposed of his stock, when a liquidation of the corporation at the time he disposed of his stock would have shown no liability from him to any creditor. On the other hand, a person buying bank stock, already issued by a bank, from another person may do so with knowledge of the bank's condition and with knowledge of the possibility of being called to pay the assessment thereon, and pay a depreciated price and

be entitled to perhaps enjoy huge gain if affairs work out favorably and, conversely, take the loss if they do not. The design of the present statute was obviously to bring the holders of stock in banks within the modern conception of corporation law and place the stock assessment on those who were stockholders at the time it becomes necessary to enforce the liability. The program of applying this modern view was begun with the Maryland Acts of 1904, Sec. 85L of Chap. 101, applicable to trust companies. The language of this Act was patterned upon the National Banking Act, Sec. 5151 of the Revised Code. It would seem that it can be safely assumed that the Legislature was familiar with the application of the National Banking Act and the procedure thereunder and desired to provide for the same procedure in Maryland. In 1910 the Legislature continued the same pattern in the present statute applicable to banks. Other states have been doing likewise. From HENLEY vs. MYERS, 215 U. S. 373, 30 S. CT. 148, it is apparent that the Kansas Legislature had acted with the same design. From BERNHEIMER vs. CONVERSE, 206 U. S. 516; 27 S. CT. 755, it is apparent that the Minnesota Legislature had acted with the same design.

Insistence by any of the original stockholders that they are liable to creditors under a former statute could only have the effect of making them liable to the creditors in one capacity and to the Receiver in another capacity, because the obligation of the present statute can not be evaded even if there were other and additional liability. The Legislature could place a liability on stockholders greater than the amount of their respective shares, mentioned in the Constitutional provision, as was held in Murphy vs. Wheatley, 102 Md. 501, so that this liability created by the present statute would not be concelled even if it were contended that a separate liability to the individual creditors exists in some way under the Constitutional provision and previously enacted statutes.

Those stockholders who acquired their stock after the present liability statute became effective on June 1, 1910, assumed their liability under the present statute when they became stockholders.

The stockholders' petition (R. 7, 8) alleges that the assessment Order of June 19, 1933, was a surprise and passed ex parte. SEC. 9, OF ART. 11 OF THE MARYLAND CODE provides for the Bank Commissioner taking charge of a bank and causing notice by advertisement in the newspapers and posting notice on the front door of the bank. When a bank is taken over by the Bank Commissioner and such notices given, the stockholders surely are put on notice that the bank is insolvent and an Order calling upon them for their stock liability should not be a surprise. But it has been held that no notice to stockholders is necessary before such an Order. In GLENN vs. WILLIAMS, 60 MD. 93, the Court held, at page 115, that stockholders could not complain because they, in their individual capacities, were not parties to the proceeding, and had no opportunity to defend against establishment by decree of the large amount of debts against the corporation. The Court said "When the Court obtained jurisdiction of the corporation, every stockholder, in his corporate capacity, was a party to the cause . . . ." On page 117 the Court said "the question of the right and power of a court of equity to order or decree assessments or calls upon the unpaid subscriptions to stock, for the purpose of paying the corporate debts, without having the individual stockholders before it as parties to the proceeding, has been settled in the most authorative way," and proceeds to cite reasons and authorities including on page 118 the citation of SANGER vs. UPTON, 91 U. S., 56, holding that in contemplation of law the stockholders were before the Court in all the proceedings touching the corporation of which they were members, not in pursuance of any express provision of the bankrupt law, but in analogy to the powers and procedure of a Court of Equity, and to meet the requirements and justice of the case. It was similarly held in BERNHEIMER vs. CONVERSE, 206 U. S. 516; 27 C. CT. 755, at page 760.

The intention of the Legislature in regard to bank stockholders' liability is further shown by the language contained in the "Emergency Banking Act". At the time of the banking stress this Act was passed to provide a banking "holiday". It placed all Maryland banks in the hands of the Bank Commissioner and provided that he could permit any banking insti-

tution to exempt itself from such custody under certain proper conditions. SEC. 71M, CHAP. 46, OF THE MARYLAND ACTS OF 1933, (Summary, Par. 4) which was a part of the "Emergency Banking Act" particularly stated that "any person who may be a stockholder at the commencement of such period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the receiver for the statutory assessment on said shares". If the Legislature had intended that Sec. 72 of Art. 11 of the Maryland Code should fix a liability on stockholders to creditors at the time the debts were contracted, and apply to previous stockholders who had sold their stock, the language of the "Emergency Banking Act" would have embraced such previous stockholders, instead of only those who were stockhelders at the commencement of the period of custody.

It is submitted that all of the aforegoing shows that the Maryland Constitutional provision does not make mandatory any particular form or manner of liability to be imposed on bank stockholders, except that they shall in some manner, in the free judgment of the Legislature, be made liable to the amount of their shares. No Maryland case has ever placed any interpretation upon the Constitutional provision. The Maryland Court of Appeals in this case has not over-ruled any previous Maryland cases. Previous Maryland cases construed only the statute with which they were dealing at that particular time. The Maryland Court of Appeals in this case construed the present liability statute. The present statute was intended to supply a more satisfactory remedy than the former statute. In PITTSBURGH STEEL CO. vs. BALTIMORE EQUITABLE SOCIETY, 113 Md. 77, at page 82, the Court said "If the change in the form of remedy thus made by the Act deprived the creditor of any existing remedy it certainly furnished him with an alternative one equally adequate and efficacious. The separate right of action at law existing in the creditor against the stockholder before the passage of the Act, although having the appearance of a reliable and efficient remedy, has been found upon close scrutiny to have been, in practice, a precarious and uncer-

tain one. The remedy supplied by the Act is a more adequate and efficacious one."

In any event, the Supreme Court of the United States has complete freedom in deciding this appeal. In COOMBES vs. GETZ, 285 U. S. 434; 52 S. CT. 435, at page 436, it was said, "The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this Court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this Court will give careful and respecful consideration and all due weight to the adjudication of the State Court, but will determine independently threof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected", and proceeds to cite numerous authorities. In dealing with a similar change previously made, this Court said in PITTSBURGH STEEL CO. vs. BALTIMORE EQUITABLE SOCIETY, 226 U.S. 455; 33 S. CT. 167, at page 168, "The plaintiff's supposed contract was subject to peculiar infirmities. His right was shared equally by all other creditors of the corporation, and not only might some other creditor by diligence have got in ahead of the plaintiff and have exhausted the fund for which the defendant could be held, but the right depended on the stockholder's will. . . . He could have paid the corporation or a receiver or other creditors. The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by consideration of fact,—of what the remedy amounted to in practice. . . . The Court of Appeals states that the remedy has been found in practice an uncertain one, less efficacious than that which is substituted. There is nothing to contradict their statement as to what experience has taught". And so, consideration of fact enteres into this case. Set-off has been denied stockholders in the Central Trust Co. in No. 12,703 Equity in the Circuit Court For Frederick County, Maryland. Other banks in Maryland, with vast sums of money involved, are in process of liquidation, as is apparent from

Lange vs. Ghingher, 168 Md. 353, and Robinson vs. Hospelhorn, 169 Md. 117. The hopeless intricacy of endeavoring to ascertain the rapidly shifting balances and deposits from day to day in these banks over a period of years would practically result in confusion, and result in no actual liability being enforced against the stockholders, if the present liability were to be construed in any other manner than that under the decision of the Maryland Court of Appeals in this case. By any other interpretation the effect of the liability fully intended by the Maryland Constitution to be imposed by the Legislature upon bank stockholders would not be promoted, but would really be nullified by being rendered ineffectual.

It is, therefore, respectfully submitted that the rulings and decree appealed from should be sustained.

In the absence of counsel the Appellee is willing to submit his cause on brief.

Respectfully submitted.

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